

NEWS

NEW JERSEY DEPARTMENT OF

LWD
LABOR AND WORKFORCE DEVELOPMENT
n j . g o v / l a b o r

Contact: Robert Corrales
Tel: (609) 292-0306
Fax: (609) 777-3634
State of New Jersey
Department of Labor and
Workforce Development
PO Box 110
Trenton, New Jersey
08625-0110

RE: Reproposed New Rules:

NJAC 12:235-7.8 and 7.9 Rules of the Division of Workers' Compensation
Asbestos Exposure Claims Under N.J.S.A 34:15-33.3; Certification to the
Uninsured Employer's Fund Medical Information in Asbestos Exposure
Cases

Attached please find the above-referenced matter which was published in the
Monday, February 7, 2005 *New Jersey Register*.

If you have any questions, please contact Frederick S. Cohen, Regulatory Officer
I at 609-777-2960.

721

LABOR AND WORKFORCE DEVELOPMENT

(c)

DIVISION OF WORKERS' COMPENSATION

**Rules of the Division of Workers' Compensation
Asbestos Exposure Claims Under N.J.S.A. 34:15-
33.3; Certification to the Uninsured Employer's
Fund Medical Information in Asbestos Exposure
Cases**

Reproposed New Rules: N.J.A.C. 12:235-7.8 and 7.9

Authorized By: Kevin P. McCabe, Commissioner, Department of Labor
and Workforce Development.

Authority: N.J.S.A. 34:1-20, 34:1A-3(e), 34:1A-12(b) and (c),
34:15-33.3 and 34:15-64.

Calendar Reference: See Summary below for explanation of
exception to calendar requirement.

Proposal Number: PRN 2005-49.

A public hearing on the proposed new rules will be held on the following date at the following location:

Monday, February 28, 2005
10:00 A.M. to 12:00 noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
1st Floor Conference Room
Trenton, New Jersey 08625

Please call the Office of Regulatory Services (609) 292-7275 if you wish to be included on the list of speakers.

Submit written comments by April 8, 2005 to:

Frederick S. Cohen, Regulatory Officer
Office of Regulatory Services
New Jersey Department of Labor and Workforce Development
PO Box 110, 13th Floor, Suite G
Trenton, New Jersey 08625-0110
Fax: (609) 292-8246

If you need this document in Braille, large print or audio cassette, contact the Office of Communications at (609) 292-7832 or NJ Relay (TTY) 1-800-852-7899.

The agency reproposal follows:

Summary

On July 6, 2004 at 36 N.J.R. 3227(a), the Department of Labor and Workforce Development proposed two new rules, N.J.A.C. 12:235-7.8 and 7.9, to implement the recently enacted N.J.S.A. 34:15-33.3. This statute concerned workers' compensation claims arising from occupational disease that results in injury or death from exposure to asbestos. Pre-proposal review and discussions had been held with interested parties, including the Commissioner of Labor and Workforce Development's Advisory Council on Workers' Compensation. The proposed rules would allow employees or their dependents to seek benefits from the Uninsured Employer's Fund (UEF) in certain situations. Specifically, an employee or his or her dependents could seek benefits from the Uninsured Employer's Fund (UEF) when, after due diligence, they could not identify or locate the workers' compensation insurance carrier(s) of the employer(s), the employer(s), or the principals of the employer(s) where the employee was last exposed to asbestos. Under proposed N.J.A.C. 12:235-7.8(a)3, compensation is to be based on the last date of exposure, if known, or if the last date is not known, then it is to be based upon an appropriate date established by the Judge of Compensation before whom the case in question is heard. Additionally, proposed N.J.A.C. 12:235-7.8(b) sets forth the due diligence standard that is required from the petitioner or the petitioner's attorney before an application is to be filed for compensation from the UEF under the statute. Specifically, the certification that would be required, pursuant to N.J.A.C. 12:235-7.9, must include the particulars of the reasonable efforts made, given the particular facts and circumstances of the case, to identify and locate all employers, principals of employers, and compensation carriers where the employee had been exposed to asbestos. Under paragraphs (b)1 through 7, such efforts would include, but not be limited to, inquiries made to the Compensation Rating and Inspection Bureau, inspection of State, county and municipal business records, acquisition and review of union records, review of tax returns and Social Security earnings histories, review of medical records and review of personal records kept by the employee. The proposal also recited under N.J.A.C. 12:235-7.8(d) that the UEF retains its subrogation and lien rights including those permitted pursuant to N.J.S.A. 34:15-33.3(b) and (c).

Moreover, proposed N.J.A.C. 12:235-7.9 specifies the additional medical and/or work information which needed to be provided to the UEF when the petitioner's claim is based upon asbestos exposure(s). This information is an addition to the general UEF certification information requirements as set forth in N.J.A.C. 12:235-7.3. Under proposed N.J.A.C. 12:235-7.9(a)1 through 12, the information that the petitioner, or the petitioner's attorney, must provide to the UEF as part of the certification in support of an asbestos exposure claim includes: data about third-party actions or latent disease claims; date of manifestation of the disease; dates of discovery, disclosure, or diagnosis; rate of progression of the disease; dates of disability due to the disease; dates of lost time related to the disease; the nature of any pre-existing conditions; the medical basis for concluding that there was a causal relationship between work exposures and the disease; the efforts made to comply with proposed N.J.A.C. 12:235-7.8(b) requiring due diligence; the dates and nature of employment during which the employee was exposed to asbestos and, the nature and extent of any future treatment for the disease. However subsection (b) provides that if any of these items of information are not provided to the

UEF, the petitioner or the petitioner's attorney shall explain why such information has not been submitted. The UEF may require additional efforts to obtain such information. In addition to the information required by subsection (a) of this proposed rule, subsection (c) thereof requires that the petitioner provide the UEF with all medical records and information related to the asbestos exposure claim.

No one attended the public hearing held on July 27, 2004. However, a number of written comments were received. These comments generally requested that the proposed rules be clarified to preclude potential misinterpretations which might impose onerous burdens on asbestos-injured employees who worked for various employers over the course of their work histories. The Director and Chief Judge of the Division of Workers' Compensation invited all of the commenters to a meeting on September 29, 2004, for a full discussion of the rule proposal and suggestions for changes that should be made in the language of the proposed rules.

Upon further review of the written comments, as well as the suggestions made by commenters at the special meeting and afterward, the Department has determined that certain changes should be made to the language of the proposed rules to prevent potential confusion as to when particular items of information must be provided to the UEF in multi-employer asbestos claims. N.J.A.C. 12:235-7.8(b) has been changed upon reproposal to delete the requirement of paragraph (b)2. It is felt that this requirement was onerous and did not contribute to the evidence required. N.J.A.C. 12:235-7.8(b)4 has been changed from the original N.J.A.C. 12:235-7.8(b)3 to add pension plan information to assist in the development of the evidence necessary. The paragraph has also been changed to delineate that the only labor union and/or pension plan documents that are necessary are those for the period of time that the petitioner was exposed to asbestos, as this is the only time frame which is probative for this type of case. N.J.A.C. 12:235-7.8(b) has been changed to include a new subsection requiring a list of other efforts by petitioner, to assure that the court as well as the respondents and UEF are aware of all efforts to determine if in fact petition has exhausted all possible avenues for information. A new subsection (c) has been added to allow the UEF to take depositions. This is necessary so that the UEF has this authority without the necessity of a motion and hearing which would delay the case. N.J.A.C. 12:235-7.9(a)11 has been changed to eliminate the sentence which reads: "Such information should include but not be limited to any OSHA, employer, union, or other environmental reports giving evidence of the level of exposure to asbestos and how such levels exceeded those encountered in the general environment; and" as it is onerous to require the petitioner to provide the information since the petitioner may not be aware of its existence or where to the information is. In its place, the sentence "Such information should include, but not be limited to, any environmental information and data giving evidence of the level of exposure to asbestos and how such levels exceeded those encountered in the general environment; and" has been added. N.J.A.C. 12:235-7.9(b) has been changed to rephrase the burden placed upon the petitioner should some information not be included in the certification. The former subsection required an explanation as to why the information is not included. The new subsection requires that the petitioner only indicate that the search was fruitless. This change reduces the onerous provision requiring an explanation.

As the Division has provided a 60-day comment period on this notice of reproposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The recently enacted N.J.S.A. 34:15-33.3 requires that the Commissioner of Labor and Workforce Development formulate regulations to implement the statute. The repropounded rules will have a positive social impact since they provide guidance to workers' compensation claimants, the survivors thereof and their attorneys on the methodology of pursuing an asbestos-related claim with the Division of Workers' Compensation. Moreover, the repropounded rules also codify UEF requirements relating to the fair and uniform treatment of parties who are seeking benefits from the UEF under the asbestos exposure statute.

Economic Impact

The repropounded rules will affect the UEF and certain petitioners who have had difficulty receiving compensation in asbestos-related disability cases and are likely to add costs to the workers compensation case process. While petitioners or petitioner's attorneys will incur costs to file the certification and documentation with the UEF in relation to these specific asbestos exposure claims, such injured workers or their dependents will recover benefits that were hitherto unavailable from last employers or carriers who could not be located or identified. In addition, the new statute and rules could increase the

PROPOSALS

UEF's workload to such extent that additional UEF staff may need to be hired in the future. No such hirings are presently anticipated and will depend on the volume of cases filed. If UEF expenses and compensation paid from the UEF increase, the UEF surcharge paid by employers to cover UEF expenses pursuant to N.J.S.A. 34:15-120.1 may need to be increased. At present, such costs cannot be quantified.

Federal Standards Statement

A Federal standards analysis is not required because the repropoed rules are not subject to any Federal requirements or standards.

Jobs Impact

The repropoed rules will have no impact on jobs, including the generation or loss of jobs.

Agriculture Industry Impact

The repropoed rules will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

There will be an impact on businesses in this State, including small businesses as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. Thus, as heretofore noted, the processing of workers' compensation cases which are asbestos-related will increase; specifically, claimants and counsel will have to absorb those costs associated with the filing with the UEF of the certifications and documentation required under these repropoed rules. Those costs, however, will be offset by the fact that claimants and counsel can now obtain recompense from those previous employers or insurance carriers which had not heretofore been reachable. Thus, the financial costs will, in effect, thereby be ameliorated, or in some cases, completely vitiated by the awards received. In addition, should the repropoed rules, and the statute upon which they are premised, generate a significant increase in the workload of the UEF, the Division of Workers' Compensation would have to consider hiring additional workers to handle the larger volume. In that case, it is possible that the surcharge paid by employers to the UEF to cover its expenses might have to be increased.

Smart Growth Impact

The repropoed rules will not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Full text of the repropoed new rules follows:

12:235-7.8 Asbestos exposure claims under N.J.S.A. 34:15-33.3

(a) After due diligence, as defined in (b) below, an application may be filed with the UEF for compensation for asbestosis or asbestos-induced cancer, including mesothelioma, resulting in injury or death from exposure to asbestos where:

1. The workers' compensation insurance carrier of the employer, the employer, or the principals of the employer where the employee was last exposed cannot be located or the employee worked for more than one employer during the time the exposure to asbestos may reasonably be deemed to have taken place but the employer or employers where the employee was last exposed cannot reasonably be identified;

2. The claim petition was pending on or filed after January 14, 2004, and had not been concluded or dismissed prior to that date; and

3. Compensation is based on the last date of exposure if known, or if such date cannot be known, on an appropriate date established by the judge of workers' compensation, pursuant to N.J.S.A. 34:15-33.3(d).

(b) "Due diligence" shall be defined as a reasonable effort on the part of the petitioner or the petitioner's attorney, given the particular facts and circumstances of the case, to determine the identities of the carrier of the employer, the employer, and/or the principals of the employer where the employee was last exposed to asbestos, as well as the identities of any other carriers, employers, and/or principals of other employers that may be liable for benefits. Such efforts shall be listed in the certification required under N.J.A.C. 12:235-7.9 and shall include, unless explained under N.J.A.C. 12:235-7.9(b), the following:

1. Inquiries made to the Compensation Rating and Inspection Bureau to ascertain the workers' compensation insurance coverage of such employers;

2. Acquisition and review of the employee's Social Security earnings history for the period or periods during which the employee was exposed to asbestos;

3. Review of the employee's Federal and State income tax returns for the period or periods during which the employee was exposed to asbestos;

4. Acquisition and review of labor union records and/or pension plan records maintained for the employee for the period or periods during which the employee was exposed to asbestos;

5. Review of the employee's medical records during and subsequent to the period during which the employee was exposed to asbestos;

6. Review of any personal records maintained by the employee with respect to employment for the period or periods during which the employee was exposed to asbestos; and

7. Any other efforts by the petitioner or the petitioner's attorney to establish due diligence.

(c) The UEF may without motion take the deposition of a petitioner and/or other individuals that may have information relevant to the application.

(d) In (a) above, the UEF shall have subrogation and lien rights including those provided by N.J.S.A. 34:15-33.3(b) and (c).

12:235-7.9 Certification to the UEF, medical information in asbestos exposure cases

(a) In addition to the items specified at N.J.A.C. 12:235-7.4 for certification to the UEF, the petitioner shall, in asbestos exposure claims under N.J.A.C. 12:235-7.8, provide the following as part of such certification:

1. Identification of all third-party actions or latent disease claims filed by or on behalf of the employee based upon exposure(s) to asbestos, including the names of the defendants and the courts in which such actions are pending or were concluded;

2. Date of manifestation of the employee's asbestosis or asbestos-induced cancer;

3. Date of discovery, disclosure or diagnosis of the employee's asbestosis or asbestos-induced cancer and its relation to the ability of the employee to work;

4. Rate of progression of the employee's asbestosis or asbestos-induced cancer;

5. Date(s) the employee was impaired or unable to work as a result of the asbestosis or asbestos-induced cancer;

6. Date(s) of any lost time for medical treatments related to asbestosis or asbestos-induced cancer;

7. Nature of pre-existing pulmonary conditions, cancer-related conditions, exposure to any other chemicals, and/or smoking history;

8. Medical basis for concluding that there is a causal relationship between the employee's work and the employee's asbestosis or asbestos-induced cancer;

9. Medical conditions pre-existing the alleged exposure(s) to asbestos, including the nature of the pre-existing condition(s), the date(s) and type(s) or medical treatment received, and the names and addresses of all medical practitioners and providers involved in the diagnosis and treatment of such condition(s);

10. Details of efforts made under the provisions of N.J.A.C. 12:235-7.8(b);

11. Dates and nature of employment during which the employee was exposed to asbestos or during which the employee was exposed to conditions which aggravated or contributed to the asbestosis or asbestos-induced cancer. Such information should include, but not be limited to, any environmental information and data giving evidence of the level of exposure to asbestos and how such levels exceeded those encountered in the general environment; and

12. Nature and extent of any future treatment for the employee's asbestosis or asbestos-induced cancer.

(b) If any of these items of information are not provided to the UEF, the petitioner or the petitioner's attorney shall indicate that a request or search has established that such item or information is not available. The UEF may require such additional information and searches that are necessary and reasonable for review of the application.

(c) In addition to the information required under the provisions of this rule in (a) above and under N.J.A.C. 12:235-7.4, the petitioner shall provide the UEF with all medical records and information related to the asbestos exposure claim.

LABOR AND WORKFORCE DEVELOPMENT